Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Sibron* v. *New York*, 392 U.S. 40 (1968), this Court held that a habeas petitioner's challenge to a criminal conviction is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Id.* at 57. The Court has consistently held that one collateral consequence sufficient to prevent mootness is the possibility that the conviction under review might be used to enhance the petitioner's sentence for any subsequent criminal conviction. See, *e.g.*, *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969). Because sentence enhancements will result from virtually every criminal conviction, this Court has instructed the lower courts to presume the existence of collateral consequences in the context of challenges to the validity of criminal convictions. See *Sibron*, 392 U.S. at 55-57. In this case, the Eighth Circuit disregarded the concession by the United States that collateral consequences were present because of the sentencing enhancements imposed by federal law as a result of Hohn's conviction, and it dismissed the case as moot. Thus, two questions are presented:

1. Whether this Court continues to adhere to its precedent that the possibility of future sentence enhancements is sufficient to prevent a challenge to a criminal conviction from becoming moot.

2. Whether, contrary to the decisions of the other courts of appeals, the Eighth Circuit was correct in finding that the presumption of collateral consequences under *Sibron* can be overcome when neither evidence nor argument has been presented to rebut the presumption.

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PETITION FOR A WRIT OF CERTIORARI

Arnold F. Hohn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's decision (App., *infra*, 1a-13a) is reported at 262 F.3d 811. The district court's opinion (App., *infra*, 14a-17a) is unreported.

JURISDICTION

The Eighth Circuit filed its opinion on August 22, 2001, App., *infra*, 1a, and it denied Hohn's timely petition for rehearing en banc (with three judges dissenting) on December 5, 2001. App., *infra*, 18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that the judicial power of the United States "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" and "to Controversies to which the United States shall be a Party."

STATEMENT OF THE CASE

Petitioner Arnold Hohn was convicted for conduct — purportedly "using" a firearm in violation of 18 U.S.C. § 924(c) by merely having it available during the possession of a controlled substance — that this Court held in *Bailey* v. *United States*, 516 U.S. 137 (1995), is not a crime. After learning of the *Bailey* decision, Hohn filed his first and only motion pursuant to 28 U.S.C. § 2255 seeking to have his conviction vacated.

For the past six years, Hohn has attempted to obtain relief for this clear violation of his constitutional rights. When the Eighth Circuit first refused to entertain his appeal, Hohn sought certiorari from this Court, which granted the writ for the express purpose of evaluating its subject matter jurisdiction. The Court ultimately determined that it did have subject matter jurisdiction and — finding Hohn's constitutional claims "important and meritorious" (*Hohn* v. *United States*, 524 U.S. 236, 250 (1998)) — remanded for further proceedings. The Eighth Circuit has now refused to hear Hohn's claims for a second time, under the theory that this Court was wrong to find that it had subject matter jurisdiction over this dispute, because the case is now and was then moot.

* * *

In 1990, Hohn was indicted for possession of firearms by a felon under 18 U.S.C. §§ 922(g) and 924(a); possession of a controlled substance near a school with intent to distribute it under 21 U.S.C. §§ 841(a) and 845a; and "us[ing] or carr[ying] a firearm" "during and in relation to" the drug offense, under 18 U.S.C. § 924(c)(1). App., *infra*, 2a.[1] At trial, no witness testified that Hohn had ever used or carried any weapon, much less done so "during and in relation to" the predicate drug offense.

Hohn was convicted on all three counts of the indictment and in July 1992 was sentenced to incarceration for 90 months — 60 months for the Section 924(c) conviction and 30 months (to be served consecutively) for other crimes. He was also sentenced to a six-year term of supervised release on the drug count and concurrent three-year terms of supervised release on

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[1] Citations to "App." are to pages in the attached Petitioner's Appendix. Citations to "A.A." are to the Appellant's Appendix, which was filed contemporaneously with Hohn's opening brief on the merits before the Eighth Circuit.

the other two counts. App., *infra*, 3a. Hohn was released from prison on October 30, 1997, but remains under supervised release.

Hohn did not challenge his Section 924(c) conviction on direct appeal, because such a challenge would have been frivolous under the Eighth Circuit's case law at the time. Hohn's conviction was affirmed on direct appeal. *United States* v. *Hohn*, 8 F.3d 1301 (8th Cir. 1993).

Two years later, this Court decided *Bailey*, which made clear that Hohn had been sentenced to serve five years in a federal prison for conduct that was not a crime. Hohn therefore moved on January 24, 1996, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[2] The district court dismissed Hohn's motion on the grounds that Hohn had "waived" his right to relief by failing to "raise his *Bailey* claim" on direct appeal, several years before *Bailey* was decided. A.A. 113-114.

The Eighth Circuit interpreted Hohn's *pro se* notice of appeal as a request for a certificate of appealability, and it denied Hohn's "request" for a certificate on the ground that Hohn's incarceration for conduct that is not made criminal by 18 U.S.C. § 924(c) involved only a statutory and not a constitutional claim. See *Hohn* v. *United States*, 99 F.3d 892, 893 (8th Cir. 1996). Hohn's petition for rehearing en banc was denied with four judges dissenting. In response to Hohn's certiorari petition, the United States government confessed error, acknowledging that claims such as Hohn's may fairly be characterized as constitutional. The United States suggested

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[2] In his Section 2255 motion, drafted *pro se*, Hohn argued that "his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by *Bailey*." *Hohn* v. *United States*, 99 F.3d 892, 893 (8th Cir. 1996) (dissenting opinion of McMillian, J.).

that the Eighth Circuit's judgment be vacated and that the case be remanded in light of the government's new position.

This Court instead granted certiorari to decide whether it had subject matter jurisdiction over the case. Following briefing and argument on the jurisdictional question, the Court held that it did indeed have subject matter jurisdiction. See *Hohn*, 524 U.S. at 239 ("The Court, we hold, does have jurisdiction."). Finding that Hohn's *Bailey* claim was "important and meritorious," *id.* at 250, the Court vacated the Eighth Circuit's judgment and remanded the case.

On remand, the Eighth Circuit acknowledged that Hohn's *Bailey* claim was not waived, but rather was procedurally defaulted. *Hohn* v. *United States*, 193 F.3d 921, 923 (8th Cir. 1999). The court expressly found that "Hohn is actually innocent of 'using' a firearm during and in relation to a drug trafficking offense" (*id.* at 924), and it remanded to the district court to determine whether Hohn was actually innocent of "carrying" a firearm during and in relation to a drug-trafficking offense. *Ibid.*

The district court found that Hohn had failed to demonstrate that he was actually innocent of "carrying" under Section 924(c). App., *infra*, 16a-17a. The court did not attempt to explain how such a conclusion could be reconciled with the prosecutor's explicit admission at Hohn's trial that he ***had no idea*** whether Hohn was carrying a gun at the time of the alleged offense under Section 924(c). See A.A. 102 ("We don't know whether he had a firearm when he went into the house. We really don't know.").

Nonetheless, finding that reasonable jurists could disagree as to the merits of Hohn's claim, the district court granted a certificate of appealability, and Hohn appealed again to the Eighth Circuit. After hearing argument on the merits of Hohn's appeal, a panel of the Eighth Circuit issued a decision

dismissing the case as moot. App., *infra*, 1a. The court was unmoved by the express concession on the part of the United States that jurisdiction was indisputably present because federal law requires that Hohn's conviction under Section 924(c) be used to enhance his sentence for any subsequent violation of that statute. *Id.* at 11a; see also Brief of Appellee at 9 n.1 (in which the United States explained to the Eighth Circuit in a footnote of its brief on the merits that "this matter is not moot").

Although the court cited this Court's case law to the effect that it was supposed to presume that jurisdiction existed (App., *infra*, 10a), it felt that future sentence enhancements should not be used to confer jurisdiction in this case. The court explained that such enhancements were "contingent upon Hohn committing another crime, something that is within his power to prevent from occurring." *Id.* at 11a. The court also believed that it lacked jurisdiction because Hohn had been sentenced to a longer concurrent term of supervised release on a conviction that he was not challenging than the term to which he had been sentenced on the Section 924(c) count. *Id.* at 6a-7a.

The court never afforded the parties any notice that it questioned its jurisdiction, nor any opportunity to be heard on the jurisdictional question. Rather, it dismissed the case *sua sponte*, without argument or briefing, because it "simply cannot think of any concrete statutory collateral consequence" that would necessarily result from Hohn's conviction under Section 924(c). App., *infra*, 13a.

Hohn filed a timely petition for rehearing. When the Eighth Circuit called for the government's response to Hohn's petition, the United States abruptly changed its position on the jurisdictional question. Prior to that submission, the United States had been consistent in representing to the federal courts that this case was not moot because of the federal statute

requiring an enhanced sentence for any subsequent conviction under Section 924(c). Notwithstanding the fact that the basis for its understanding that the case was not moot had absolutely nothing to do with the length of Hohn's supervised release, the government cited as its reason for its change of heart that it "had not performed the requisite math and determined that the term of supervised release imposed on the Section 924(c) conviction had recently expired." United States' Response To Appellant's Petition For Rehearing With Suggestion Of Rehearing En Banc, at 9.

On December 5, 2001, the Eighth Circuit denied Hohn's petition. App., *infra*, 18a. Judges Loken, Bye and William Jay Riley dissented from the denial of rehearing en banc. *Ibid.*

REASONS FOR GRANTING THE WRIT

For decades, this Court has consistently adhered to the principle that a challenge to a criminal conviction is moot only if there is "no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). Thus, this Court has repeatedly held that a challenge to a criminal conviction is not moot if there is even a remote possibility that the challenged conviction could subject the petitioner to an enhanced sentence for a future offense. See, *e.g.*, *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977); *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969). In this case, after recognizing that Hohn's Section 924(c) conviction would expose him to a mandatorily enhanced sentence for any future violations of the statute, the Eighth Circuit nonetheless dismissed this case as moot.

Perhaps because it acted without briefing or other guidance on the jurisdictional question, the Eighth Circuit directly contravened this Court's binding precedent in several areas.

Thus, it found Hohn's case moot on the basis of a longer term of supervised release imposed concurrently on another count (see App., *infra*, 6a-7a), ignoring this Court's instruction "that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." *Benton*, 395 U.S. at 790. It disregarded this Court's precedent that future sentence enhancements always constitute collateral consequences when habeas petitioners challenge their criminal convictions. It then engaged in an extensive search for other specific collateral consequences, ignoring this Court's instruction that it has "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." *Sibron*, 392 U.S. at 55. The decision below warrants summary reversal.

If the Court declines to reverse, it should grant certiorari to resolve a deeply entrenched circuit split regarding how to implement the presumption of justiciability in criminal conviction challenges. In this case, after the United States had affirmatively conceded that there were collateral legal consequences to Hohn's conviction and that the case was therefore not moot, the Eighth Circuit proceeded *sua sponte* to disregard the presumption and dismiss the case. Although the Eighth Circuit's approach is manifestly contrary to this Court's precedent, its confusion is reflective of broader uncertainly among the courts of appeals, which have developed four different approaches to implementing the presumption. The split concerns an important and recurring issue of federal law, and the positions taken by several of the circuits (including the court below) threaten to deprive habeas petitioners of any opportunity of obtaining relief for a conviction of a federal crime that has been unconstitutionally imposed. Further review is therefore warranted.

I. THE EIGHTH CIRCUIT DISREGARDED THIS COURT'S PRECEDENTS ESTABLISHING THAT A POSSIBILITY OF COLLATERAL CONSEQUENCES, INCLUDING FUTURE SENTENCE ENHANCEMENTS, PRECLUDES A FINDING OF MOOTNESS

The Court should summarily reverse the decision below because the Eighth Circuit contravened decades of this Court's precedents by holding that the possibility that Hohn's Section 924(c) conviction would be used to enhance his sentence for future offenses was not a sufficient collateral consequence to make his case justiciable.

As this Court has repeatedly made clear, when challenges to criminal convictions bear the possibility of collateral consequences — expressly including the possibility that the conviction may be used to trigger sentence enhancements for future crimes — they are ***always*** justiciable. See *Spencer* v. *Kemna*, 523 U.S. 1, 9-12 (1998) (recognizing the rule in the context of challenges to criminal convictions and declining to extend it to challenges to parole revocations); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977); *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969); *Sibron* v. *New York*, 392 U.S. 40, 55-57 (1968).

The general rule that this Court has established is that a challenge to a criminal conviction is moot "only if it is shown that there is ***no possibility*** that ***any*** collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron*, 392 U.S. at 57 (emphasis added). Because, under the federal sentencing guidelines, prior criminal convictions will almost always be used to enhance a petitioner's sentence for any subsequent crime, criminal convictions — and

particularly felony convictions — will give rise to collateral legal consequences in virtually every case. For that reason, the Court has "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." *Id.* at 55.

The Court's observation that "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences," *Spencer*, 523 U.S. at 12 (internal quotation marks omitted), certainly holds true in the particular circumstances of this case. Should Hohn ever face another Section 924(c)(1) conviction, his Section 924(c) conviction that is being challenged in this case will result in Hohn being subject to a minimum twenty-five-year prison sentence, and possibly up to life imprisonment. 18 U.S.C. § 924(c)(1)(C).[3] Were Hohn to prevail in this case, any future conviction would otherwise carry a minimum sentence of only five years. 18 U.S.C. § 924(c)(1)(A). Although Hohn is subject to several other collateral consequences as a result of his Section 924(c) conviction,[4] the enhancement provided in Section 924(c) for recidivist offenders leaves no doubt that this case is justiciable. Under federal law, Hohn stands in a considerably worse position as a result of his conviction under Section 924(c) than he would if he succeeded in having that unconstitutional conviction vacated. It is precisely this ironclad statutory

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[3] The sentence will be at least twenty-five years, but if the firearm is either (i) a machine gun or destructive device, or (ii) equipped with a silencer or muffler, the sentence will be life imprisonment. 18 U.S.C. § 924(c)(1)(C).

[4] These other collateral consequences include, among other things, the risk of having his testimony impeached at any subsequent trials as a result of the present conviction, see *Sibron*, 392 U.S. at 55-56; *Evitts*, 469 U.S. at 391 n.4, and the possibility of receiving an enhanced sentence for other subsequent crimes under the sentencing guidelines as a result of a higher criminal history rating.

collateral consequence that the United States invoked in its merits brief in the Eighth Circuit as proof that "this matter is not moot." Brief of Appellee at 9 n.1.

The Eighth Circuit proffered three reasons for its unwillingness to follow the established law in this area. First, it rejected the United States' admission that jurisdiction was present by claiming that "the government's proposed collateral consequence in this case is contingent upon Hohn committing another crime, something that is within his power to prevent from occurring." App., *infra*, 11a.[5] That statement reflects a wholesale rejection of this Court's precedent. Whether habeas petitioners commit subsequent crimes is a matter that has always been within their power to prevent. But for over forty years, this Court has been adamant in holding that the prospect of enhancement of subsequent criminal sentences is always sufficient to confer jurisdiction on a challenge to a criminal conviction — even though it is to some degree speculative whether the petitioner will commit other crimes and actually experience the adverse consequences. See *Benton*, 395 U.S. at 790-791 ("Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable.").

In 1993, for example, this Court held that a challenge to a "diversionary scheme" (*i.e.*, a disposition under which, after the petitioner had served his sentence of two years of probation, the underlying criminal charges were ***dismissed***) was justiciable

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[5] In support of this justification, the Eighth Circuit cited this Court's decision in *Spencer*. That citation strongly suggests that the court had improperly decided to apply the law governing the justiciability of challenges to parole revocations rather than the law governing the justiciability of challenges to criminal convictions. We demonstrate *infra* (at 13-15) why *Spencer* did not overrule this Court's prior precedent and why it does not support a finding of mootness here.

because of the possibility that the disposition could be used in calculating the defendant's criminal history category "in the event of a subsequent federal conviction." *Minnesota* v. *Dickerson*, 508 U.S. 366, 371-372 n.2 (1993). This Court's other cases are unanimous in rejecting the Eighth Circuit's logic. See, *e.g.*, *Mimms*, 434 U.S. at 108 n.3; *Evitts*, 469 U.S. at 391 n.4.

Second, this Court just explained in *Spencer* that "[a]n incarcerated convict's (***or a parolee's***) challenge to the validity of his conviction ***always satisfies the case-or-controversy requirement***." 523 U.S. at 7 (emphasis added). Hohn, of course, remains on supervised release (the federal equivalent of parole), and his case therefore unquestionably satisfies the case-or-controversy requirement. But the Eighth Circuit refused to obey this Court's instruction in *Spencer* based on its assumption that — because Hohn was convicted of other crimes and sentenced to a longer concurrent term of supervised release on one of the convictions that is not presently being challenged — reversal of the Section 924(c) conviction would not hasten Hohn's discharge from supervised release or otherwise inure to Hohn's benefit in any immediate way. The court also apparently believed it was writing on a blank slate with respect to this issue, opining that this Court's cases "did not examine whether the convictions at issue produced collateral consequences independent from any other convictions in the petitioners' records." App., *infra*, 12a; see also *id.* at 6a-7a.

The latter statement was simply wrong. As the leading commentator has explained, this Court ***has*** held that

> a defendant convicted of two crimes, but sentenced to concurrent sentences, may challenge one of the convictions even though its reversal would not hasten his or her release from custody. The Court has

> reasoned that the additional conviction might have future collateral consequences, such as by increasing the severity of a subsequent sentence if there is a new offense.

ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.2, at 131 (3d ed. 1999) (citing, *e.g.*, *Benton*, 395 U.S. at 790-791).

One case directly on point is *Benton*, in which the petitioner had been convicted of both burglary and larceny, and had received a sentence of 15 years on the burglary count and a concurrent sentence of 5 years on the larceny count. In entertaining a habeas petition challenging the larceny count, this Court inquired into its own jurisdiction because "reversal of [the larceny] conviction would not require the State to change the terms of petitioner's confinement." 395 U.S. at 787-788. After a thorough analysis, the Court concluded that "the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." *Id.* at 790. The Court's explanation applies equally here:

> For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day. Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable.

Id. at 790-791.

The Eighth Circuit's decision in this case is a direct repudiation of the rule in *Benton*. Compare App., *infra*, 6a-7a (holding that "Hohn's case is moot under the general mootness

inquiry" because "Hohn's three-year term of supervised release for his § 924(c)(1) conviction runs concurrent to the six-year term of supervised release stemming from his conviction under §§ 841(a) and 845a") with *Benton*, 395 U.S. at 790 (holding that this Court's cases "make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy"). Summary reversal is appropriate for this reason alone.

Finally, although the Eighth Circuit twice acknowledged (App., *infra*, 10a, 12a) that, in *Spencer*, this Court did not overrule the *Sibron* line of cases, it nonetheless suggested that *Spencer* might have signaled the Court's intent to move in that direction. Whatever *Spencer* signified for the future, it is undeniable that it did not make any change in the well-established law governing the mootness of habeas petitions challenging criminal convictions.

The issue in *Spencer* was whether the presumption of collateral consequences that had long existed in the context of attempts to vacate criminal convictions should be ***extended*** to attempts to overturn parole revocations. Although the Court recognized and reaffirmed the well-established practice of presuming collateral consequences in cases involving challenges to criminal convictions (see 523 U.S. at 10-12), it declined to extend the *Sibron* line of cases to the parole revocation context, explaining that different considerations apply:

> [O]f particular relevance to the question whether the practice of presuming collateral consequences should be extended to challenges of parole termination: In the context of criminal conviction, the presumption of significant collateral consequences is likely to comport with reality. As we said in *Sibron*, it is an "obvious fact of life that most criminal convictions do in fact entail

> adverse collateral legal consequences." The same cannot be said of parole revocation.

Spencer, 523 U.S. at 12 (quoting *Sibron*, 392 U.S. at 55). It is therefore clear that the *Spencer* Court in no way intended to overrule the *Sibron* line of cases in the context of challenges to criminal convictions.[6]

Even if the Eighth Circuit believed that this Court might wish at some point to reconsider its precedents in the context of challenges to criminal convictions (see, *e.g.*, App., *infra*, 12a (opining that *Spencer* was "strongly critical of *Pollard* and its progeny")), the court did not have the power to disregard what is undeniably still governing law. This Court has explained that lower courts ***must*** follow its precedent, and that only the Court itself may determine whether its own precedent has been overruled. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving

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[6] The court below quoted dicta from a recent Seventh Circuit case expressing the opinion that this Court's decision in *Spencer* had attempted to bring habeas law into conformance with a recent toughening of standing requirements. See App., *infra*, 11a (quoting *Diaz* v. *Duckworth*, 143 F.3d 345, 347 (7th Cir. 1998)). The court below misconstrued *Diaz*. In that case, the Seventh Circuit continued to recognize after *Spencer* that, under *Sibron*, a risk of collateral consequences, including the prospect of a sentence enhancement, was sufficient to prevent mootness in challenges to criminal convictions. See 143 F.3d at 345. To the *Diaz* court, the only "difficult question is whether the burden of establishing collateral consequences ***of a judgment other than conviction*** can, after *Spencer*, ever be carried when * * * the only consequences of which the defendant is complaining are contingent upon his committing future crimes or future disciplinary violations." *Id.* at 346 (emphasis added). Thus, the Eighth Circuit's citation to *Diaz* does not support its analysis in this case. Rather, it only confirms that the court had departed from the law governing the justiciability of challenges to criminal convictions.

to this Court the prerogative of overruling its own decisions."). Ironically, the Court reaffirmed the point ***in this very case***. See *Hohn*, 524 U.S. at 252-253 ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

Summary reversal is warranted here because the issue presented is an important and recurring issue of federal law on which this Court's instruction would be valuable. Enhancements to the sentence of any subsequent crime are collateral consequences that will be present in every habeas case challenging a criminal conviction. The federal sentencing guidelines expressly look to prior criminal history as a factor in imposing longer sentences for subsequent crimes. The same is true in all 50 states. See, *e.g.*, *Daniels* v. *United States*, 523 U.S. 374, 380 (2001) ("each of the 50 States has a statute authorizing enhanced sentences for recidivist offenders"). By reaffirming its established law through a summary reversal in this case, the Court can prevent lower courts from engaging in the waste of judicial resources that would result from ignoring these collateral consequences and engaging in needless searches for other consequences.

The Eighth Circuit departed from decades of this Court's precedents and from the established practice of every other court of appeals[7] by holding that the possibility of collateral

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[7] Before the Eighth Circuit's decision in this case, every circuit that had considered the risk of enhanced future sentencing in the context of cases involving challenges to criminal convictions had classified the risk of an increased sentence as a collateral consequence sufficient to prevent mootness. See, *e.g.*, *Wood* v. *Hall*, 130 F.3d 373, 376 n.1 (9th Cir. 1997); *Puchner* v. *Kruziki*, 111 F.3d 541, 543 (7th Cir. 1997); *United States* v. *Reider*, 103 F.3d 99, 101 (10th Cir. 1996); *United States* v. *Maddox*, 48 F.3d 555, 560 (D.C. Cir. 1995); *Minor* v. *Dugger*, 864 F.2d 124, 127 (11th Cir.

consequences, including an enhanced sentence for a future crime, was not sufficient to make Hohn's challenge to his Section 924(c)(1) conviction justiciable. The Court should summarily reverse the decision below.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE IMPLEMENTATION OF THE PRESUMPTION OF JUSTICIABILITY

Ever since its decision in *Pollard* v. *United States*, 352 U.S. 354 (1957), this Court has "abandoned all inquiry into the actual existence of specific collateral consequences and * * * presumed that they existed" whenever habeas petitioners challenge the validity of their criminal convictions. *Sibron*, 392 U.S. at 55. In this case, the Eighth Circuit flatly disregarded that presumption of justiciability by ignoring the representations by both parties that the case was not moot and by undertaking itself (without briefing, argument, or other guidance from the parties) to defeat jurisdiction. Although the Eighth Circuit's approach is demonstrably contrary to this Court's precedent, its confusion is emblematic of the broader uncertainty among the courts of appeals as to how to implement the presumption of justiciability.

The Court should grant certiorari in this case to resolve the conflict among the circuits concerning the implementation of the presumption of justiciability. The courts of appeals are hopelessly divided on this point, having devised four different approaches to implementing the presumption. Because this is

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1989); *Anderson* v. *Smith*, 751 F.2d 96, 100 n.3 (2d Cir. 1984); *United States* v. *Maldonado*, 735 F.2d 809, 813 (5th Cir. 1984).

an important and recurring issue of federal law that has fractured the courts of appeals, further review is necessary.

A. The Courts Of Appeals Are Sharply Divided As To How To Implement The Presumption Of Justiciability

There is a great deal of confusion among the courts of appeals regarding how the presumption of justiciability should be implemented. Currently, the courts of appeals take four different approaches when determining whether criminal conviction challenges are moot: (1) the Ninth Circuit applies an irrebuttable presumption that collateral consequences are present; (2) the Second, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits apply the presumption of collateral consequences, and either explicitly or implicitly place the burden of rebutting the presumption on the government; (3) the First, Third, and Fourth Circuits place the burden of proving possible collateral consequences on the petitioner; and (4) the Eighth Circuit stands alone in holding that a court may *sua sponte* disregard the presumption, even where the parties are in agreement that the case is not moot. The Court should therefore grant certiorari in order to settle this important and frequently recurring question of federal law.

The *Sibron* Court stated that, in the context of challenges to criminal convictions, a case is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction," 392 U.S. at 57, and explained that the Court has "abandoned all inquiry into the actual existence of specific collateral consequences and * * * presumed that they existed." *Id.* at 55. Although this practice of presuming jurisdiction in the context of challenges to criminal convictions differs from the otherwise-applicable rule that a party must demonstrate

sufficient facts to create jurisdiction in the federal courts, the Court has consistently applied the rule in *Sibron*. See, *e.g.*, *Spencer*, 523 U.S. at 10-12 (citing *Dickerson*, 508 U.S. 366); *Evitts*, 469 U.S. at 391 n.4; *Mimms*, 434 U.S. at 108 n.3; *Benton*, 395 U.S. at 790-791.

Lower federal courts, however, have been divided as to how to interpret these precedents. In cases involving challenges to criminal convictions, one circuit applies an irrebuttable presumption that collateral consequences are present, six circuits place the burden on the government to overcome the presumption by proving that there are no collateral consequences, three circuits place the burden on the petitioner to prove that there is at least a possibility of collateral consequences, and the Eighth Circuit stands alone in holding that a court may *sua sponte* disregard the presumption even after the government has conceded the presence of collateral consequences.

The Ninth Circuit, interpreting *Sibron* in light of Federal Sentencing Guidelines that inevitably use prior convictions to enhance criminal sentences, has held that the *Sibron* presumption is irrebuttable. *Chacon* v. *Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), superseded by statute on other grounds, as recognized in *Morris* v. *Woodford*, 229 F.3d 775, 779 (9th Cir. 2000). The Ninth Circuit has consistently followed *Chacon*. See *United States* v. *Palomba*, 182 F.3d 1121, 1123 n.3 (9th Cir. 1999); *Wood* v. *Hall*, 130 F.3d 373, 376 (9th Cir. 1997); *Larche* v. *Simons*, 53 F.3d 1068, 1070-1071 (9th Cir. 1995) (although there were no collateral consequences present, the case was not moot because *Chacon* had created an irrebuttable presumption). Thus, Hohn's claim would clearly be justiciable in the Ninth Circuit.

Six other circuits — the Second, Fifth, Sixth, Seventh, Tenth and Eleventh — have interpreted *Sibron* as creating a rebuttable presumption, placing the burden on the government to prove that there is no possibility of collateral consequences. See, *e.g.*, *United States* v. *Mercurris*, 192 F.3d 290, 293-294 (2d Cir. 1999); *United States* v. *Maldonado*, 735 F.2d 809, 813 (5th Cir. 1984); *Green* v. *Arn*, 839 F.2d 300, 301-302 (6th Cir. 1988); *Diaz* v. *Duckworth*, 143 F.3d 345, 345-346 (7th Cir. 1998); *D.S.A.* v. *Circuit Court Branch 1*, 942 F.2d 1143, 1146 n.3 (7th Cir. 1991); *Oyler* v. *Allenbrand*, 23 F.3d 292, 294 (10th Cir. 1994); *Malloy* v. *Purvis*, 681 F.2d 736, 739 (11th Cir. 1982). In all of these circuits, Hohn's claim would also be justiciable, as the United States made no attempt to meet its burden of demonstrating the absence of collateral consequences.[8]

Three circuits — the First, Third and Fourth — have not formally applied the presumption, instead placing the burden on the petitioner to demonstrate that there is at least a possibility of collateral consequences. See, *e.g.*, *Arnold* v. *Panora*, 593 F.2d 161, 163-164 (1st Cir. 1979); *Steele* v. *Blackman*, 236 F.3d 130, 134 n.4 (3d Cir. 2001) (finding case not to be moot because petitioner had demonstrated sufficient collateral consequences); *Kravitz* v. *Pennsylvania*, 546 F.2d 1100, 1102-1103 (3d Cir. 1977) (same); *Broughton* v. *North Carolina*, 717

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[8] Contrary to the Eighth Circuit's implication, this Court's decision in *Spencer* did not alter the implementation of the presumption in any way. Thus, each of these courts to have considered the issue following *Spencer* has reaffirmed its prior precedent. See, *e.g.*, *Mercurris*, 192 F.3d at 293-294; *Diaz*, 143 F.3d at 345-346.

F.2d 147, 149 (4th Cir. 1983).[9] Even in these three circuits, Hohn's claim would be justiciable. Hohn could have met his burden of proving justiciability either by pointing to the government's concession that jurisdiction was present, or by pointing to the collateral consequences that are present in this case (such as the mandatory statutory enhancement for recidivist offenders under Section 924(c)).

The Eighth Circuit alone has taken the position that a court may *sua sponte* overcome the presumption, even where the government has conceded that the case is not moot. Only under the Eighth Circuit's approach, which (1) disregarded the presumption of justiciability, (2) ignored the government's concession that the case was not moot, and (3) rejected future sentence enhancements as collateral consequences, could this case possibly be dismissed as moot.

The Eighth Circuit purported to begin its jurisdictional analysis "by presuming that Hohn's § 924(c)(1) conviction creates sufficient collateral consequences to render his appeal justiciable." App., *infra*, 10a. But it then proceed to find that the presumption had been overcome (*id.* at 13a) on the basis that it "simply cannot think of any concrete statutory collateral consequence stemming from Hohn's § 924(c)(1) conviction."[10]

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[9] The D.C. Circuit appears to vacillate between the second and third approaches to implementing the presumption. Compare *Otey* v. *United States*, 417 F.2d 559, 561 n.10 (D.C. Cir. 1969) (failing to apply the presumption in a challenge to a criminal conviction) with *United States* v. *Fadayini*, 28 F.3d 1236, 1241 (D.C. Cir. 1994) (challenge to a criminal sentence was justiciable because the government had failed to meet its burden of showing a lack of collateral consequences).

[10] The phrasing of the Eighth Circuit's conclusion further evidences its hostility to implementing the presumption of justiciability. The Eighth Circuit was willing to find jurisdiction only if it could "think of any concrete statutory collateral consequence." App., *infra*, 13a. That statement

The Eighth Circuit's approach to implementing the presumption completely misses the point. Whether or not the court could think of a collateral consequence (without asking the parties for assistance) is of no consequence, because, as this Court just explained in *Spencer*, "we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences." 523 U.S. at 8. To find that a presumption has been "overcome[]" (App., *infra*, 13a) because of an inability to think of evidence in support of the fact one is supposed to be presuming is to accord absolutely no weight to the presumption. The Eighth Circuit's approach is therefore fundamentally inconsistent with governing law.

Over thirty years have passed since *Sibron*, and the confusion among the lower federal courts has progressively become more entrenched. Every one of the courts of appeals with jurisdiction over criminal cases has taken a position in the split, and nothing can be gained from further percolation of the issue. The Court should act now to end the four-way circuit split, and to provide clear guidance as to how courts should implement the presumption that criminal conviction challenges are justiciable.

B. The Implementation Of The Presumption Of Justiciability Is An Important And Recurring Issue

The issue of subject matter jurisdiction under Article III is present in every case proceeding through the federal courts. The presumption of justiciability arises in every habeas petition presenting a challenge to a criminal conviction after the petitioner has been released from confinement. There have

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flagrantly disregards this Court's instruction that courts are required "to count collateral consequences that are remote and unlikely to occur." *Spencer*, 523 U.S. at 8.

been hundreds of cases presenting the issue of the presumption of justiciability since this Court's decision in *Sibron*, although many of the decisions have been unpublished. The issue can be expected to arise with similar frequency in the future.

It is also unquestionably an important issue of federal law. The jurisdiction of the federal courts is always significant, but the issue presented in this case is particularly crucial, because it determines whether actually innocent habeas petitioners like Hohn will be provided a forum in which to free themselves from the collateral consequences resulting from unconstitutional criminal convictions.

The Eighth Circuit appeared to view the presumption as optional (see App., *infra*, 10a ("a court ***may*** presume collateral consequences in the context of a criminal conviction") (emphasis added)) based on its assumption that Hohn could always challenge his unconstitutional Section 924(c) conviction at a later date in the event that he is ever actually subject to an enhanced sentence as a result of the conviction. The Eighth Circuit's approach of denying actually innocent petitioners like Hohn access to the federal courts is indefensible as a matter of law and policy, for two reasons.

First, the Eighth Circuit imposes an unacceptable burden on habeas petitioners by assuming that their actual innocence will be just as easy to prove at some later date. As the *Sibron* Court recognized:

> The question of the validity of a criminal conviction can arise in many contexts, and the sooner the issue is fully litigated the better for all concerned. It is ***always*** preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover,

> litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a ***potential*** legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action.

392 U.S. at 56-57 (emphasis added) (citation omitted). It is grossly unfair not to allow petitioners to bring habeas claims challenging wrongful convictions that inevitably bear collateral consequences until *after* the petitioners have suffered from the enhanced sentence and do not have the same evidentiary resources available with which to prove their actual innocence.

Second, the Eighth Circuit may well be wrong that delayed adjudication of actual innocence is even procedurally possible. In *Daniels*, this Court explored "whether * * * the individual who was sentenced may challenge his federal sentence though a motion under 28 U.S.C. § 2255 on the ground that his prior convictions were unconstitutionally obtained." 532 U.S. at 376. The Court held that "as a general rule, he may not," although "[t]here may be rare circumstances in which § 2255 would be available." *Ibid.* Thus, the rule imposed by the Eighth Circuit in this case seriously threatens to place habeas petitioners in a judicially devised Catch-22 in which the petitioners may ***never*** be able to obtain relief for unconstitutionally imposed convictions. Such a system cannot be reconciled with fundamental notions of due process.

Although the Eighth Circuit is unique in the extent to which it has departed from this Court's precedent in this area, the approach adopted by the First, Third and Fourth Circuits (and

occasionally by the D.C. Circuit) — in which the burden is placed on the petitioner to demonstrate collateral consequences — also plainly violates this Court's discussion in *Sibron* and can have the same adverse effects as the Eighth Circuit's approach. Many petitioners, as was the case with Hohn when he initiated his challenge to his Section 924(c) conviction, are unrepresented by counsel, and are required to proceed *pro se*. The complex area of habeas corpus presents many challenges for *pro se* petitioners, and adding the requirement of alleging collateral consequences will result in many petitions being dismissed on mootness grounds, denying petitioners any opportunity to challenge their convictions. This deprivation is all the more inappropriate because this Court's practice of presuming collateral consequences should — at a minimum — operate to remove this procedural hurdle.

This case presents a perfect example of the problems inherent in the diverse approaches adopted by the courts of appeals. Arnold Hohn has unconstitutionally served every day of a five-year prison sentence for a federal crime of which he was actually innocent. Ignoring the representation of the United States to the contrary, the Eighth Circuit *sua sponte* held that — until Hohn spends ***even more time*** in prison as a direct result of his unconstitutional conviction — his case is not important enough for a federal court to hear. Further review is warranted here.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted.

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